

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

VOITH INDUSTRIAL SERVICES, INC.

and

Case 9-CA-097589

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL UNION NO. 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF THE
ADMINISTRATIVE LAW JUDGE'S DECISION

I. OVERVIEW:

This matter is before the Board upon Respondent's Exceptions filed on March 12, 2014, to the Decision of Administrative Law Judge Paul Bogas, which issued on January 23, 2014. Judge Bogas found, as alleged in the Complaint issued on April 15, 2013, that Respondent violated Sections 8(a)(1), (3), (4) and (5) of the Act. Specifically, Judge Bogas found that Respondent violated Section 8(a)(1) of the Act by coercively warning employees Kelly Stein and Patti Jo Murphy not to tell supervisors or others in the office that they were going to press workplace complaints by bringing them to the attention of the NLRB or OSHA. Judge Bogas found that Respondent violated Sections 8(a)(1), (3) and (4) of the Act by issuing discipline to, and then terminating, Stein and Murphy for engaging in protected concerted activity, because of their affiliation with and activities on behalf of Teamsters 89 (the Union or Teamsters), and because of their participation in the Board's processes. Finally, Judge Bogas found that Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain with the Union by unilaterally imposing a new attendance policy on unit employees and by failing and refusing to bargain with the Union by unilaterally imposing a new policy requiring employees to load rail

cars during non-daylight hours. Respondent's exceptions to Judge Bogas' findings and recommendations have no basis in law or fact. Judge Bogas' findings that Respondent violated the Act, as set forth in his Conclusions of Law, are overwhelmingly supported by both the record evidence and Board precedent.^{1/}

II. ANSWER TO RESPONDENT'S EXCEPTIONS:

A. Judge Bogas Properly Found that Respondent Violated Section 8(a)(1) by Ordering Stein and Murphy Not to Tell Supervisors or Office Employees that They Would Complain to the NLRB and OSHA. (Resp. Exception No. 12)

It is axiomatic that an employer violates Section 8(a)(1) when it threatens employees about making concerted complaints to government agencies. *Certified Service, Inc.*, 270 NLRB 360 (1984), *Michigan Metal Processing Corp.*, 262 NLRB 275 (1982). There was no dispute that Respondent's Facility Manager, Jason Wilson, told Employees Stein and Murphy that they needed to stop telling Respondent's supervisors that they would go to the NLRB or OSHA. (Tr. 76-77, 220, 909-910) The cases cited by Respondent in its brief in support of exceptions have factual bases that differ so substantially from those at issue here as to hardly be worthy of comment. Unlike cases such as *Media Gen. Hosp. Operations v. NLRB*, 394 F.3d 207 (4th Cir. 2005), *Trus Joist MacMillan*, 341 NLRB 369 (2004), *Piper Realty Corp.*, 313 NLRB 1289 (1994), and the others cited by Respondent, there is nothing in the record to suggest that Stein or Murphy used profanity or abusive language, threatened physical violence or otherwise engaged in any egregious or opprobrious conduct that would remove their actions from the protection of the Act. Respondent would have the Board find that employees lose the protection of the Act whenever supervisors are annoyed by employee threats to go to the government over their working conditions. Respondent also appears to argue that employees should lose the protection

^{1/} The decision of the Administrative Law Judge will be referenced herein as (ALJD at __). The transcript will be referenced as (Tr. __) and exhibits will be referenced as (G.C. Ex. __) or (Resp. Ex. __). Respondent's exceptions will be referenced as (Resp. Exception __).

of the Act if they threaten to take safety complaints to the government, but are unable to present empirical data to support their opinion that employee working conditions are unsafe. There is no basis in the law for this novel proposition. To the contrary, it is well settled that employees who bring group concerns to the attention of management are engaged in protected concerted activity. *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Further, there is no basis in the record to suggest that Wilson objected to the manner in which Stein and Murphy were voicing their concerns about safety and labor related issues to supervisors. As Judge Bogas points out, Wilson's only complaint, as voiced to Stein and Murphy, was that they were threatening to make complaints to OSHA and the NLRB – not that they were doing so in an egregious or opprobrious fashion. (ALJD at 17)

Contrary to Respondent's assertion that Wilson's statements to Stein and Murphy were somehow non-threatening, because Wilson allegedly told them they were free to make such complaints or that they could do what they had to, it must be remembered that Wilson issued other discipline to these employees in the same meeting, shortly after making this statement, and that this discipline was also found to be unlawful by Judge Bogas. (Tr. 77, G.C. Ex. 4, ALJD at 20) Additionally, Wilson's statement in the same conversation that a clearly unwarranted discipline for refusing to load rail (discussed below) had come from "high up" in Respondent's managerial hierarchy demonstrated that the threats to go to the NLRB and OSHA had already resulted in discipline. Thus, Wilson's statements in context clearly meant that Stein and Murphy could do what they had to – but that there would be consequences from Respondent. Unlike the situation in *J.S. Mech., Inc.*, 341 NLRB 353 (2004), where a supervisor asked a union organizer why he would want to apply for work at an open shop, Wilson did not simply ask Stein and Murphy why they would complain to OSHA or the NLRB – he ordered them to stop telling Respondent's supervisors that they would do so.

B. Judge Bogas Correctly Found that Stein and Murphy Engaged in Protected Concerted Activity, Union Activity, and Labor Board Activity and that Respondent Had Knowledge of These Activities. Judge Bogas Also Correctly Found that Respondent Demonstrated Animus Against Protected Concerted Activity, Union Activity and Board Activity. (Resp. Exception Nos. 1, 2, 18, 19, 20)

Judge Bogas properly analyzed the issues of the discipline and termination of Stein and Murphy under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *approved in NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983). Respondent does not except to Judge Bogas' finding that Stein and Murphy engaged in protected concerted activity and that Respondent had knowledge of this. Likewise, Respondent does not except to Judge Bogas' finding, as reflected in the stipulations, that Stein and Murphy engaged in protected union activity and protected Board related activity and that Respondent has knowledge of this participation.

Contrary to Respondent's exceptions, Judge Bogas was on very solid ground in finding evidence of Respondent's hostility toward Teamsters-affiliated employees. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951) While Respondent is correct that Jason Miller did not testify at the hearing before Judge Rosenstein ^{2/} Judge Bogas cited many reasons for crediting Miller's testimony, e.g. that his testimony was not contradicted by other witnesses, was given in a clear and certain manner, and was not undermined on cross-examination. (ALJD at 4) Additionally, Judge Bogas stated that his findings were based on his observation of the demeanor of the witnesses. (ALJD at 2) For all of these reasons, Judge Bogas credited Miller's testimony that Jason Wilson informed him that Respondent was "at war" with the Teamsters. (Tr. 415-416, 427) Judge Bogas also credited

^{2/} In its Exceptions and its Brief in Support of Exceptions, Respondent repeatedly refers to Judge Rosenstein as "Judge Rothstein."

Miller's testimony that the manager who hired him told him that Respondent wanted the majority of its employees to be affiliated with the United Auto Workers Union and that other of Respondent's supervisors expressed negative opinions of the Teamsters, blaming all mishaps at the facility on Teamsters-affiliated employees. (Tr. 417-419) Judge Bogas credited Miller's testimony that sometime after the first NLRB trial concluded on October 3, Wilson, who had previously told Miller to be lenient with the Teamster-affiliated employees during the pendency of the hearing, told him that they could now get rid of the "problems." (Tr. 512, 515, 530) Judge Bogas did not rely exclusively on Miller's testimony in finding Respondent's anti-Teamsters bias. He relied on documentary evidence in which Respondent's supervisors referred to Teamsters-affiliated employees as "special" employees when they communicated with one another. (Tr. 635, 671, 958; G.C. Exs. 43, 44, 45) Judge Bogas also found significant an e-mail from Respondent Vice-President of Operations McElroy dated December 15, which referred to the stress and distractions that the "Teamster nonsense" had caused Respondent. (Tr. 565-66, G.C. Ex. 33)

Respondent totally misrepresents the holding of *Mediplex of Stamford*, 334 NLRB 903 (2001) in which the Board specifically disagreed with an ALJ who found that an employer's expression of general anti-union animus was insufficient for the General Counsel to satisfy his initial *Wright Line* burden. Respondent cites *Merchant Truck Line, Inc. v. NLRB*, 577 F.2d 1011 (5th Cir. 1978) for the proposition that employer hostility toward unionism in general is insufficient to demonstrate animus. This case is, of course, irrelevant to the instant case since there is overwhelming evidence that Respondent was hostile toward the Teamsters – the particular union that Stein and Murphy were affiliated with – not just unionism in general. Likewise, *Ozburn-Hessey Logistics, LLC*, 2013 WL 1804147 (ALJD April 26, 2013) is irrelevant here since, in the instant case, Judge Bogas found that Respondent had reasons to single out Stein

and Murphy and make examples of them since they also engaged in Board activity and protected concerted activity.

As to his finding of Respondent's anti-Board animus, Judge Bogas relied upon a text message where Wilson described former colleague, Jason Miller, who testified at the instant ALJ hearing with a profane modifier. (Tr. 966, G.C. Exs. 49(a), 49(b)) While Judge Bogas incorrectly stated that this text was sent during the pendency of the trial before Judge Rosenstein, it is meaningless whether this e-mail was sent during the pendency of the trial before Judge Rosenstein or the trial before Judge Bogas, as the clear meaning of the text demonstrates extreme hostility and disdain for those who appear as witnesses in NLRB proceedings with unfavorable testimony about Respondent. It strains credulity to believe, as Respondent suggests, that Respondent would be hostile to Board activity in one ALJ proceeding, but not the other. Further, as discussed above, Judge Bogas found it significant that Jason Wilson admitted to warning Stein and Murphy to stop telling supervisors that they would go to the Labor Board, showing additional animus toward employees engaged in Board activity. (ALJD at 19)

Also, as discussed above, Judge Bogas observed that Wilson admitted to warning Stein and Murphy to stop telling supervisors and office employees that they would make complaints to OSHA. (ALJD at 19) Judge Bogas relied, in part, on this warning to find that Respondent demonstrated animus toward protected concerted activity. Respondent makes much of Judge Bogas' partial reliance upon Supervisor Calhoun's threat to terminate Stein and Murphy for voicing concerns about working in the dark as evidence of Respondent's animus against protected concerted activity and suggests that Calhoun's statement came in response to Stein and Murphy engaging in an unprotected work stoppage. Initially, Respondent could have easily called Supervisor Calhoun as a witness in this matter, but it failed to do so. Additionally, Stein, Murphy and another Teamsters-affiliated employee, Sandra Rhodes, did not refuse to work in the

dark – they merely expressed concern about the safety of the assignment and asked to be assigned to other duties. (Tr. 200) Calhoun’s immediate and unprovoked reaction of telling these employees that they could work in the dark or be deemed to have quit demonstrates considerable animus toward employees who merely asserted a safety concern. Additionally, the record supports a finding that Stein and Murphy never refused to work in the dark and that Respondent voluntarily offered them janitorial and cleaning work for a period of time until December 21.

Respondent cites *Ozburn-Hessy Logistics*, supra. for the proposition that the myriad record evidence of animus should be ignored because Respondent accommodated Stein and Murphy’s concern about working in the dark for a period of time by not requiring them to do so. Miller’s testimony, fully credited by Judge Bogas, that Wilson said Respondent could get rid of its “problems” after the trial before Judge Rosenstein concluded explains this accommodation, as it demonstrates that Respondent was attempting to not give the General Counsel and Teamsters additional ammunition during the pendency of the previous trial. (Tr. 872, ALJD at 11).

Having found that Counsel for the General Counsel satisfied his initial *Wright Line* burden with regard to the disciplines and discharges issued to Stein and Murphy, Judge Bogas correctly found that the burden shifted to Respondent and that Respondent failed to carry its burden of proving that it would have issued the same disciplines to Stein and Murphy in the absence of any protected activity.

C. Judge Bogas Correctly Found that Respondent Violated Sections 8(a)(1), (3) and (4) by Issuing Discipline to Stein and Murphy on December 21, 2013 For Refusing to Work. (Resp. Exception Nos. 13, 15, 17)

Judge Bogas correctly found that Respondent violated Sections 8(a)(1), (3) and (4) on December 21, when Supervisor Elizabeth Dawson issued warnings to Stein and Murphy for refusing to load a rail car. The judge found that this discipline was obviously contrived since

Stein and Murphy were disciplined for refusing to perform work on a day that they were not even present. (ALJD at 20-21) Although Wilson, apparently realizing that Respondent had overreached in disciplining Stein and Murphy for something they didn't do, later retracted the discipline, his statements in doing so made the original discipline seem even more suspicious. Specifically, he told the employees that the decision to discipline was coming from "higher up" in Respondent's management hierarchy and that they needed to stop threatening to go to the NLRB or OSHA. (Tr. 76-77, 220) Wilson proceeded to substitute a new unlawful discipline for refusing to load a rail car. (Tr. 77, G.C. Ex. 4) Respondent's argument in its exceptions that it did not actually issue the discipline since it no longer keeps the discipline in employee personnel files easily fails. In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board set forth its criteria for curing past unfair labor practices. The Board found that repudiation must be: (1) timely, (2) unambiguous, (3) specific to the coercive conduct, and (4) free from other prescribed illegal conduct. In the instant case, Respondent did not cure its violations by simply retracting the discipline. In order to cure its violation, Respondent would have been obligated, at a minimum, to clarify for the employees that they have a Section 7 right to engage in protected concerted activities, union activity and Board activity. To the contrary, Wilson told Stein and Murphy to *stop* threatening to go to the NLRB and OSHA and included the ominous statement that unnamed individuals high in Respondent's management hierarchy were seeking to discipline them. Further, Wilson proceeded to immediately issue a suspension to Stein and Murphy, which Judge Bogas found was also illegal.

D. Judge Bogas Correctly Found that Respondent Violated Sections 8(a)(1), (3) and (4) by Issuing Suspensions to Stein and Murphy on December 21, 2013 For Attendance. (Resp. Exception Nos. 4, 5, 6, 7, 8, 13)

Judge Bogas correctly found that Respondent violated Sections 8(a)(1), (3) and (4) on December 21, when Wilson issued suspensions to Stein and Murphy for attendance, based on

reaching the 7.5 point mark in Respondent's attendance policy. Judge Bogas, relying upon his observations of Miller's demeanor at the hearing of this matter, credited his testimony that employees were granted at least three excused medical absences per year. (Tr. 380, 411-412, 440, 490, 494-495, 850; ALJD at 8-9) Included in Stein's attendance point total were 3 points she accumulated for documented medical absences, which should have been automatically excused under Respondent's policy. (Tr. 71, 102-104; G.C. Exs. 7, 8(a), 8(b), 11(a), 51) Murphy's total also included 3 points for documented medical absences which should have been excused. (Tr. 234-236, 414; G.C. Exs. 16, 17(a), 17(b)) The suspension documents issued to Stein and Murphy also demonstrated that they had both been given attendance points for being absent on December 20, a date for which neither was regularly scheduled to work. Judge Bogas found that Stein and Murphy were not given any advance notice of the requirement that they work on December 20, leaving it entirely unclear how Stein and Murphy were supposed to know of the mandatory work day. (ALJD at 20) The record is devoid of any evidence that would enable Respondent to satisfy its *Wright Line* burden of demonstrating that it has disciplined other employees for failing to work on mandatory days when they were not notified that work was mandatory. Contrary to Respondent's position, the fact that Stein brought in a doctor's note to excuse the December 20 absence is not evidence that Stein knew in advance that mandatory overtime was assigned for that day – she easily could have learned of this after the fact. The record is simply silent on that point. Quite an additional leap of logic would be required to impute Stein's supposed knowledge of the mandatory overtime assignment on December 20 to Murphy as Respondent suggests. Respondent's attempt to cite other examples of employees receiving points for missing mandatory overtime assignments misses the point, since there is no evidence that those individuals did not know that they were supposed to work those days.

Judge Bogas properly concluded that Respondent failed to meet its shifted burden showing that it would have suspended Stein and Murphy even in the absence of their union activities.

In *Voith Industrial Services, Inc.*, 2012 WL 6755112 (ALJD December 21, 2012), presently before the Board, Judge Rosenstein found that Respondent committed numerous violations of the Act in an effort to displace the Teamsters Union in favor of the UAW Union. Miller's testimony, along with extensive documentary evidence such as the attendance records of UAW affiliated employees Cannon and Profumo, demonstrated that Stein and Murphy were given points for days that they were absent for medical reasons despite the fact that Respondent has granted nearly unlimited authority to its supervisors to excuse absences. The testimonial and documentary evidence further demonstrated that Respondent's supervisors have utilized this discretion to excuse more than two medical absences for a number of employees with issues similar to Stein and Murphy as well as absences occasioned by matters ranging from childcare concerns to motorcycle mechanical problems. (Tr. 387-389, 393, 487, 495, 519, 712-713, 771, 786, 791, 850; G.C. Ex. 25, 28, 42; Resp. Ex. 9(g)) Respondent's argument in its exceptions that it uniformly terminated employees upon reaching 8 attendance points is meaningless since the record is replete with evidence that it simply didn't give attendance points to UAW affiliated employees or that it liberally removed those points in negotiations with the UAW. Thus, cases such as *Engineered Comfort Sys., Inc.*, 346 NLRB 661 (2006), et. al. cited by Respondent are inapposite here.

E. Judge Bogas Correctly Found that Respondent Violated Sections 8(a)(1), (3) and (4) by terminating Stein and Murphy on January 4, 2013. (Resp. Exception Nos. 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16)

Judge Bogas correctly concluded that Respondent's subsequent discharge of Stein and Murphy was illegal for all of the same reasons that the suspensions were. The discharges, which were occasioned by Stein and Murphy reaching 8.5 attendance points, included the same

attendance points for medical related absences which Judge Bogas found were unlawfully used as a basis for their suspensions. Stein's attendance matrix now included an additional point for a day that she was in the hospital. (G.C. Exs. 7, 8(a), 8(b)) Murphy's attendance matrix now included a point for December 22 when she was off due to blood pressure issues and a point for December 27, which she missed due to a schedule change of which she was not notified. (Tr. 225-227; G.C. Ex. 50). Respondent appears to misunderstand that under the now shifted *Wright Line* burden, it must prove that it ordinarily disciplines employees for being absent on days when they did not know they were supposed to work. The record is totally devoid of any such evidence. Further suspicion is cast on the decision to terminate Stein and Murphy because Wilson admittedly had no conversation, whatsoever; with them about the reason they were terminated. (Tr. 101, 940) Although Stein and Murphy both had appeals and emergency vacation time that they could have used to excuse absences leading to their termination, Respondent took advantage of the confusion that it had created about how its attendance policy worked in order to discharge them without alerting them to these possible alternatives. (G.C. Ex. 50; Resp. Ex. 5) Of course, by not telling Stein and Murphy why they were being terminated, Wilson gave them no opportunity to point out the many reasons that made the terminations so inconsistent with Respondent's ordinary practices. Respondent's argument in its brief in support of exceptions that it doesn't automatically apply vacation time to excuse absences misses the point – Respondent didn't even inform Stein and Murphy of this option so that they could make the decision to use their vacation time. As Judge Bogas noted, it appears from the plain language of Respondent's attendance policy that appeals of attendance points were initiated automatically upon an employee presenting a medical excuse for an absence, but this was not done for Stein and Murphy. (ALJD at 9)

Judge Bogas' finding that Respondent's attendance policy had not been distributed to Stein or Murphy is well founded in the record evidence, particularly because, as the finder of fact, he credited the testimony of Stein, Murphy and Miller over that of Wilson and Kitchen, noting that Kitchen's testimony was obviously exaggerated and inaccurate and that Respondent had not called a single non-supervisory witness to testify about its purported widespread dissemination of its attendance policy. (Tr. 83-84, 138, 164, 222, 263, 434) Respondent attempts to make much of the fact that it did not discipline or terminate all of the Teamsters or all of the witnesses in the prior NLRB trial, but this argument must fail. The termination of Stein and Murphy was clearly intended to stand as a warning to all Teamsters-affiliated employees and anyone who would contemplate participating in Board proceedings or making a concerted complaint to a government agency.

F. Judge Bogas Properly Concluded that Respondent Violated Section 8(a)(5) by Implementing a New Policy Requiring Employees to Load Rail Cars in the Dark and a New Attendance Policy Without Giving Notice and an Opportunity to Bargain to Teamsters 89. Stein and Murphy Would Not have Been Terminated Under the Predecessor's Attendance Policy. (Resp. Exception Nos. 3, 21, 22)

In *Voith*, supra., Judge Rosenstein ruled that Respondent is a successor to Jack Cooper Auto Handling and had an obligation to bargain with Teamsters 89. That case is presently before the Board on Respondent's exceptions. Judge Bogas properly ruled that Respondent would not be permitted to re-litigate the successorship issue in the instant case. As in *Wynn Las Vegas, LLC*, 358 NLRB No. 81, slip op. at 3-4 (2012), Judge Bogas precluded Respondent from re-litigating the exact same issue that was litigated before Judge Rosenstein, and which is presently before the Board for decision. In *Superior Container*, 276 NLRB 532, 533 (1985), cited by Respondent, the ALJ noted that he could find no authority for the proposition that he was entitled to rely upon a prior ALJ's determination then before the Board. Obviously, this decision was rendered long before *Wynn Las Vegas, LLC*, and has no applicability to the instant case.

It makes no sense to allow the parties to waste valuable Board resources re-litigating an issue that they already had a full and fair opportunity to litigate before the Board.

It is well settled that an employer violates Section 8(a)(5) of the Act when it unilaterally modifies terms and conditions of employment for bargaining unit employees without notifying or bargaining with the union. In this case, there is no dispute that Respondent did not notify or bargain with Teamsters 89 prior to implementing policies on attendance and loading rail cars in the dark. Inasmuch as Teamsters 89 was the rightful representative of the successor bargaining unit in this case, Respondent violated the Act by failing to bargain with Teamsters 89 over significant changes to its attendance policy and over its new policy of requiring employees to load rail cars in the dark. There can be no dispute about Judge Bogas' finding that Respondent's new requirement that employees load rail cars in the dark represented a wholesale departure from the longstanding past practice that rail loading only took place in the day time since the facility lacked night loading lights. (Tr. 62, 69, 199, 207-208, 259, 306-307, 378) This change significantly increased the danger to employees and drastically altered their working conditions, forcing them to use their hands to feel their way out of poorly lit rail cars during night loading. (Tr. 252-253) Unlike the situation in *EAD Motors Eastern Air Devices, Inc.*, 346 NLRB 1060 (2006), cited by Respondent, it is not as if the unit employees previously worked some in the dark and some in the light and that the relative percentage of each kind of work changed – the unit employees had never previously been required to work in the dark. Also, unlike *Little Rock Downtown, Inc.*, 148 NLRB 717 (1964), Respondent was not simply reviving a work requirement that had previously been abandoned – the un-refuted evidence is that bargaining unit employees were never previously required to load in the dark. Jason Wilson's testimony about the normal practices at other facilities where he has worked was totally irrelevant to the issue at hand. Clearly, the obligation of an employer to bargain with a union over the terms of unit

employees' employment is based on the past practice at the bargaining unit's facility – not on what employees might do at some other facility.

Likewise, there can be no dispute that Respondent made wholesale changes to the attendance policy, with the new policy bearing not the slightest resemblance to the old. Although the changes are too numerous to list, among the more significant were the fact that doctors notes' could no longer be used to excuse unlimited absences, the substitution of an entirely new progressive discipline policy for the previous one and the replacement of the previous 6-month rolling period for accumulation of attendance related discipline with a 1-year rolling period. (Tr. 100, 171, 223-24, 269-270, 342, 346, 350, 367; G.C. Exs. 18(a), 19, 20, p.3; Resp. Ex. 5)

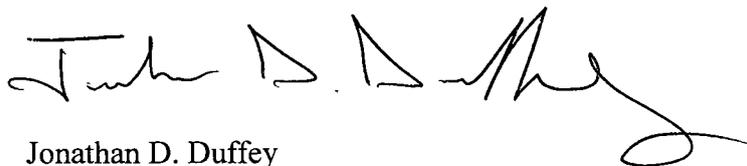
Although Judge Bogas found it unnecessary to rule, at this juncture, whether Stein and Murphy would have been entitled to a remedy under an 8(a)(5) theory for unlawful termination, Respondent inexplicably took an exception to a non-existent finding on this point. (ALJD at p. 22, fn. 17) Although this question is better left to the compliance stage, it takes little effort to demonstrate that Respondent's argument that Stein and Murphy would have been terminated under the predecessor's attendance policy and thus, not entitled to a remedy under the 8(a)(5) theory, is ludicrous. The record establishes, and Judge Bogas found, that under the predecessor's policy, excessive absenteeism was defined as three unexcused absences in a 30-day period. Responding to Respondent's example in its brief in support of exceptions, Stein's first three absences in May of 2012 would have resulted in a joint meeting with Stein, Teamsters 89 and Respondent. The two June absences would have been insufficient to trigger any additional step, since it would have taken one additional unexcused absence to equal the three in a 30-day period which would have led to a written reprimand. Likewise, Murphy's three absences on

May 19, 20 and 25, 2012, would have led to a joint meeting. The May 29 and June 4 absences would not have implicated the disciplinary process since it would have taken an additional absence in a 30-day period to equal the three that would trigger a written reprimand. Additionally, Respondent's argument fails to take into account other differences between Respondent's attendance policy and the predecessor's such as that under the predecessor's policy, sick days were available to excuse days and could have been utilized in the absence of a doctor's note and that the Teamsters largely policed the attendance of its members. Thus, it would be highly speculative to conclude that the absences pointed to by Respondent would have even led to points under the predecessor's policy.

III. CONCLUSION:

The Administrative Law Judge's Decision finding that Respondent violated the Act is fully supported by the record and extant Board law. Respondent has failed to demonstrate that its exceptions have merit as a matter of fact or law. For these reasons and based on the foregoing, the Board should reject all of the Respondent's exceptions and issue an Order in due course consistent with the Judge Bogas' recommendations.

Dated at Cincinnati, Ohio this 26th day of March 2014.



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